93-673

NO. (1)

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PATRICE DICKINSON,
Petitioner,

VS.

OHIO BELL COMMUNICATIONS, INC.
AND AMERITECH, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LLOYD J. RAMSEY
BARBARA BELOVICH CHADWELL
JULIA RYAN SULLIVAN
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(216) 884-8018
Attorneys for Petitioner Dickinson

QUESTION PRESENTED FOR REVIEW

Whether the Civil Rights Act of 1991 applies retroactively to cases that were pending in courts at the time of its enactment?

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PATRICE DICKINSON,
Petitioner,

VS.

OHIO BELL COMMUNICATIONS, INC.
AND AMERITECH, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals, rendered on July 7, 1993 and issued as a mandate on July 29, 1993 was not officially reported. This was an appeal from the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, rendered on March 24, 1992.

JURISDICTIONAL STATEMENT

The judgment of the Sixth Circuit Court of Appeals was rendered on July 7, 1993 and issued as a mandate on July 29, 1993. No petition for rehearing was refiled. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATUTE INVOLVED

Section 102(a) of the Civil Rights Act of 1991 amends 42 U.S.C. Section 1981 to include the following language:

(a) Right of Recovery. —

(1) Civil rights. — In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42

U.S.C. Section 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. Section 2000e-2 or Section 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. Section 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(c) Jury Trial. — If a complaining party seeks compensatory damages under this section —

(1) any party may demand a trial by jury; . . .

STATEMENT OF THE CASE

In 1988, plaintiff Patrice Dickinson, petitioner herein, filed the instant action under Title VII and 42 U.S.C. Section 1981 alleging that her termination from the defendant, Ohio Bell Communications, Inc., respondent herein, was illegally based on her race and sex. On February 14, 1992, the trial court dismissed the Section 1981 claim on a motion for summary judgment, citing Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Thereafter, the case proceeded to trial on February 24-25, 1992. From the bench, just prior to trial, the trial court denied petitioner's request for a jury trial on the Title VII claim and her request for retroactive application of the Civil Rights Act of 1991. The trial court found for the respondent. On appeal, a panel of the Sixth Circuit Court of Appeals affirmed the trial court's judgment.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER THE CIVIL RIGHTS ACT OF 1991 APPLIES RETROACTIVELY TO THIS CASE WHICH WAS PENDING ON THE DATE OF THE

ENACTMENT AND SHOULD FURTHER GRANT CERTIORARI BECAUSE THE COURT HAS GRANTED CERTIORARI IN CASES ON THIS ISSUE.

On November 21, 1991, Congress enacted the Civil Rights Act of 1991, which broadened the remedies for victims of discrimination in employment. Specifically, and of importance to the case at bar, Section 102 of the Act conferred a right to a jury trial and a right to recover compensatory and punitive damages. In the instant case, the petitioner was denied a jury trial and the trial court specifically held that the Act was not retroactive. The appellate court affirmed.

The issue of retroactivity has been litigated throughout the circuits and is now before this Court in two cases: Landgraf v. USI Film Industries, No. 92-757 and Rivers v. Roadway Express, Inc., No. 92-938 (a Sixth Circuit decision). Further, this Court has held other cases addressing the retroactivity issue pending the Landgraf and Rivers decisions. These cases include Johnson v. Uncle Ben's, No. 92-737; Kuhn v. Island Creek Coal Co., No. 92-787; and Hicks v. Brown Group, Inc., No. 92-1538.

It is therefore appropriate for this Court to grant certiorari in this case because the question presented herein is identical to the issues in the above-cited cases.

CONCLUSION

For the foregoing reasons, petitioner requests that the Court grant her petition for certiorari, or, in the alternative, hold this petition pending the decisions in Landgraf and Rivers.

Respectfully Submitted,

LLOYD J. RAMSEY
BARBARA BELOVICH CHADWELL
JULIA RYAN SULLIVAN
Attorneys for Petitioner Dickinson

APPENDIX

APPENDIX A
NOT RECOMMENDED FOR PUBLICATION

No. 92-3348

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICE DICKINSON,
Plaintiff-Appellant,
v.
OHIO BELL COMMUNICATIONS, INC.
AND AMERITECH, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Filed: July 7, 1993

BEFORE: KEITH and **JONES**, Circuit Judges; and **BROWN**, Senior Circuit Judge.

PER CURIAM. In this Title VII case, the plaintiff, Patrice Dickinson ("Dickinson"), appeals the judgment of the district court, contending that the district court erred in concluding that she failed to establish a prima facie case of discrimination and to carry her ultimate burden of proof that the defendant, Ohio Bell Communications, Inc. violated Title VII when it removed her from her position as an Account Executive. She also argues that the district court erred in refusing to give her a jury trial on her Title VII claims. For the reasons stated below, we **AFFIRM** the judgment of the district court.

I.

Dickinson, a black woman, took a job with Ohio Bell Telephone Company in Cleveland, Ohio in 1979 as a Marketing Administrator ("MA"). MA's, later renamed Systems Design Consultants

("SDC"), assisted Account Executives ("AE"), the persons responsible for selling large telecommunications systems, with designing phone systems for potential clients and in implementing the phone systems once they are sold. She was a successful SDC, and Ohio Bell promoted her several times to give her responsibility with larger and more complex phone systems. In 1984, after divestiture, Ohio Bell spun off the defendant, Ohio Bell Communications, Inc. ("OBCOM"), as a separate concern to market Ohio Bell's telecommunications products, such as phone systems. Dickinson moved to OBCOM in 1984, and continued to work as an SDC. Her performance at OBCOM was always rated above average, and she received several performance-related, year-end bonuses.

In late 1984, Dickinson was promoted to a full-time AE by Gary Miller, a black man who was a Cleveland-based sales manager. In early June 1985, Miller left OBCOM for another position, and a man named Ken Krstolic became her sales manager. Krstolic met with Dickinson shortly after he became sales manager to review her current sales and sales forecasts. She presented an optimistic sales forecast at that meeting. He met with her again in July and August of 1985 and she again presented optimistic forecasts; however, her sales had not been good and she had not closed any of the sales that she had projected.

At the August meeting, Krstolic told Dickinson that she would have to attain $200,000 in sales by the end of 1985. Krstolic also informed Dickinson that he would review her performance on a quarterly basis in 1986, and that if a change became necessary, she could resume her old job as an SDC. In 1985, her total sales were $183,345, consisting mostly of item sales, and she closed none of the accounts that she had listed in her sales forecasts.

On December 19, 1985, Dickinson presented Krstolic with her 1986 sales forecast, projecting sales of approximately $1,000,000. Krstolic permitted Dickinson to continue as an AE into 1986, but told her that she must come reasonably close to $200,000 in sales for the first quarter of 1986, that is, one fourth of the total 1986 objective of $800,000 for Cleveland-based AE's, otherwise she would be removed from her AE position, but would be permitted to continue

with OBCOM as an SDC.

When Dickinson's sales for the first quarter of 1986 amounted to only $53,153, Krstolic informed her that he would have to make a change. On March 27, 1986, Krstolic informed her that she would be removed from the AE position, but that she could return to her former position as an SDC. She refused to accept the SDC position, so Krstolic fired her.

On March 30, 1988, after going through the appropriate EEOC procedure, Dickinson filed the instant action. On March 19, 1991, she filed an Amended Complaint, the one on which trial was had, containing claims under Title VII, 42 U.S.C. § 1981, and the Equal Pay Act. The complaint also contained a claim for negligent infliction of extreme emotional distress and a demand for trial by jury. On February 14, 1992, the trial court granted summary judgment for OBCOM on the common law tort claim and the Section 1981 claim. The court proceeded to trial on the Equal Pay Act and Title VII claims.

On the morning the trial was to begin, the district court denied Dickinson's jury trial demand on the Title VII claim, but offered to permit her to bifurcate the trial to try the Equal Pay Act claims to a jury. She refused the offer and the case proceeded to a bench trial on both claims. At the close of her proof, the district court dismissed the Equal Pay Act claims and, after trial, found for OBCOM on the Title VII claim, ruling that Dickinson had not established a prima facie case of discrimination and that, in any event, she did not carry her ultimate burden of proof. Dickinson then perfected a timely appeal to this court.

II.

This court reviews a district court's findings of fact under the clearly erroneous standard, Fed. Rule Civ. P. 52(a); and its conclusions of law de novo. Holmes v. Donovan, 984 F.2d 732, 735 (6th Cir. 1993).

III.

Dickinson first contends that the district court's findings that she did not establish a prima facie case of discrimination or carry her ultimate burden of proof were clearly erroneous. In a disparate treatment case, the plaintiff carries the ultimate burden of proving that he or she "has been the victim of intentional discrimination."

Shah v. General Electric Co., 816 F.2d 264, 267 (6th Cir. 1987). Where, as in the instant case, a plaintiff does not present direct evidence of discrimination, a court must follow the three-step analysis established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). There, the Court held, the plaintiff must first make out a prima facie case of discrimination. Id. at 802. Next, the burden shifts to the employer who must "articulate some legitimate, nondiscriminatory reason" for its actions. Id. The burden then shifts back to the plaintiff to show that the proffered reason is just a pretext to conceal a discriminatory act.

Our review of the record convinces us that the district court's findings that Dickinson did not establish a prima facie case of discrimination and, in any event, carry her ultimate burden of proof are not clearly erroneous. During 1985 Dickinson sold only $183,345 worth of telecommunications equipment. This is over $400,000 less than the $600,000 sales goal set for all AE's for 1985. Further, of the ten AE's based in Cleveland, only two produced less revenue than Dickinson during the first quarter of 1986, but both of them had prior sales histories and a number of deals in the pipeline and both ended up with sales in excess of $800,000 by the end of 1986. Further, Ernestine Williams, a black woman, was a successful AE with OBCOM before she moved to personnel, and a black woman named Theo Scott was also a successful AE in the Toledo, Ohio office at the time Dickinson was fired.

The district court's finding, based upon this record, that Dickinson did not establish a prima facie case of discrimination or carry her ultimate burden of proof is not clearly erroneous. Rather, the record shows that OBCOM had a legitimate business reason for firing Dickinson: namely, that she did not produce sufficient revenue. Accordingly, we conclude that the district court did not err in finding against Dickinson on the Title VII claim.

IV.

We turn now to Dickinson's contention that the district court erred when it refused to give her a jury trial on her Title VII claim. At the time Dickinson filed her lawsuit, the prevailing view was that Title VII claims could not be tried to a jury because the only relief available under Title VII was equitable relief; e.g., an injunction or

back pay[1]. 42 U.S.C. § 2000e-5(g) (1988); Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979); Patterson v. McLean Credit Union, 491 U.S. 164, 211 (1989) (Brennan, J., dissenting in part and concurring in part); EEOC v. Detroit Edison Co., 515 F.2d 301, 308-309 (6th Cir. 1975).

In 1991, however, Congress passed the Civil Rights Act ("Act") of 1991, which amended Title VII[2] to permit plaintiffs to recover compensatory and punitive damages under Title VII and authorized a trial by jury for those claims.[3] 42 U.S.C. § 1981(a)(1), (c)(1) (Supp. III 1991).[4] Congress did not, however, create a right to a jury trial for back pay and the other equitable relief permitted under § 2000e-5(g). Unfortunately, Congress did not specify whether the Act applies retroactively; section 402 of the Act merely provides that the Act takes effect upon enactment. Civil Rights Act of 1991, Pub. L. No. 102-166, § 401(a), 105 Stat 1071, 1099 (1991).

---

[1] Dickinson filed an amended complaint in March, 1991, the Civil Rights Act of 1991 did not go into effect until November, 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, § 401(a), 105 Stat. 1071, 1099 (1991).

[2] Section 1981(a)(1) provides:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [2000e-5(g)], from the respondent.

42 U.S.C. § 1981(a)(1) (Supp. III 1991).

[3] Section 1981a(c) provides: If a complaining party seeks compensatory or punitive damages under this section —

> (1) any party may demand a trial by jury.

42 U.S.C. § 1981a(c) (Supp. III 1991) (emphasis added).

[4] Compensatory, and in some situations punitive damages, were available under Section 1981 before the Act went into effect. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975).

This court, however, has held in a number of decisions, both published and unpublished, that the Act does not apply retroactively. See, e.g. Holt v. Michigan Dept. of Corrections, 974 F.2d 771 (6th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992).[5] Thus, we conclude that the district court did not err in refusing Dickinson's demand for a jury trial on her Title VII claims.

V.

The judgment of the district court is **AFFIRMED**.

A TRUE COPY.
Attest:
LEONARD GREEN, Clerk.

ISSUED AS MANDATE July 29, 1993
Costs: None
FILING FEE ..... $
PRINTING ..... $
TOTAL ..... $

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[5] We are aware that the Supreme Court has taken certiorari of a decision of this court to decide whether the Act applies retroactively. Harvis v. Roadway Express Co., 973 F.2d 490 (6th Cir. 1992), cert. granted sub nom. Rivers v. Roadway Express, 61 U.S.L.W. 3580 (February 22, 1993) (92-938). We will decide the case at bar, however, because Rivers will not be argued this term and the law in this court is clear that the Act does not apply retroactively.

93-673

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PATRICE DICKINSON,
Petitioner,

VS.

OHIO BELL COMMUNICATIONS, INC.
AND AMERITECH, INC.,
Respondent.

SUPPLEMENTAL APPENDIX

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APPENDIX B

FILED
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICE DICKINSON,
Plaintiff
-vs-
OHIO BELL COMMUNICATIONS, INC., et al.
Defendants

JUDGE PAUL R. MATIA

CASE NO. 1: 88CV0786

ORDER

This matter is before the Court on defendant Ohio bell's Motions to Dismiss and for Summary Judgment and plaintiff Dickinson's Motion to Strike the above dispositive motions. Defendant's Motion to Dismiss and plaintiff's Motion to Strike/ Dismiss as Untimely are both DENIED. Defendant's Motion for Summary Judgment is GRANTED IN PART, but only with respect to Counts IV and V of the Amended Complaint.

Plaintiff Dickinson, an African-American female, was promoted by the defendant to the position of "Account Executive" as of January 1985. Compensation for account executives was computed on a base salary and commissions from sales. Each account executive pertinent herein was compensated under the same formula. Plaintiff's sales for 1985 and the first quarter of 1986 were substantially below the established minimum goal. Due to these deficiencies, plaintiff was threatened orally and in writing on several occasions with termination if her sales were not improved. Several white, male account executives were also well below the same minimum levels during their initial employ-

ment as account executives. No action was taken to terminate these white, male account executives.

Plaintiff was subsequently terminated on March 27, 1986. Although disputed by the parties, plaintiff allegedly spoke with the internal EEO Ohio Bell representative prior to the termination. Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on August 6, 1986. The EEOC field office issued a "Determination" finding no probable cause for the Title VII and the Equal Pay Act claims. Upon plaintiff's appeal to the Board of Review, the Board issued a "Determination" on February 24, 1988, initially only with respect to the Equal Pay claim. Plaintiff filed a Complaint with respect to the Equal Pay Claim on March 30, 1988. Thereafter, on May 18, 1988, plaintiff filed an Amended Complaint adding Title VII claims. The EEOC on December 2, 1988, issued a subsequent Determination sua sponte concerning both Title VII and Equal Pay claims to correct their earlier "administrative oversight" of February 24, 1988.

The Court finds that the Amended Complaint of May 18, 1988, was filed within the required 90-day period after the final determination was issued on February 24, 1988.

Furthermore, since plaintiff has established that genuine issues of material fact exist with respect to Counts I, II, and III of the Amended Complaint, defendant's Motion for Summary Judgment with respect to Counts I-III also is DENIED. Given the fact that similarly situated white males also below the minimum sales during their initial employment were not terminated, a genuine issue of material fact exists with respect to the Title VII claims in Count I. Additionally, a genuine issue of fact exists concerning the transfer of accounts from plaintiff to white, male account executives.

The Court also denies defendant's Motion for Summary Judgment with respect to Counts II and III. Issues remain concerning the date and consequence of plaintiff's complaint to defendant's internal EEO. If plaintiff complained to the internal EEO prior to her termination, the retaliatory discharge claim in Count II would be further supported. Genuine issues of fact also exist concerning the Equal Pay Act invoked by plaintiff in Count

III.

The Court does not find any genuine issues of material fact and determines that defendant is entitled to judgment as a matter of law on Count IV, § 1981 claims, and Count V, Infliction of Emotional Distress. Under recent cases, Patterson v. McLean Credit Union, 491 U.S. ___, 109 S. Ct. 2363 (1989), 42 U.S.C. § 1981 does not provide a remedy for claims of racially motivated termination. Furthermore, with respect to Count V, Infliction of Emotional Distress, plaintiff has not alleged genuine issues of material fact sufficient to withstand summary judgment.

THEREFORE, IT IS ORDERED that defendant's Motion to Dismiss and plaintiff's Motion to Strike/Dismiss as Untimely are both DENIED. Defendant's Motion for Summary Judgment is GRANTED IN PART with respect to Counts IV and V of the Amended Complaint.

IT IS SO ORDERED.

_____

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICE DICKINSON,
Plaintiff
-vs-
OHIO BELL COMMUNICATIONS, INC.
Defendant

JUDGE PAUL R. MATIA
CLEVELAND, OHIO

CIVIL ACTION
NUMBER C88-0786

EXCERPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE PAUL R. MATIA,
JUDGE OF SAID COURT,
ON MONDAY, FEBRUARY 24, 1992.

APPEARANCES:

For the Plaintiff: Barbara Chadwell, Esq.
Robert F. Belovich, Esq.
5638 Ridge Road
Parma, Ohio 44129

For the Defendant: Edward Bettendorf, Esq.
45 Erieview Plaza, Room 1422
Cleveland, Ohio

Official Court Reporter: Susan K. Trischan, RPR, CM
539 U.S. Courthouse
201 Superior Avenue
Cleveland, Ohio 44114
216/696-5899

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

MONDAY, FEBRUARY 24TH, 1992

THE COURT: Members of the jury panel, I apologize for the delay this morning. We were working on a legal question that arose which, based upon the Court's ruling, has resulted in the fact that the case will proceed to trial before the Court rather than before the jury.

What happened in this particular case is that there are claims involving several different federal statutes in this matter, and one of the statutes was amended by Congress in November of 1991 to add a provision for jury trial. Prior to that time there had been no right to a jury trial. However, Congress failed to include any kind of direction or provision with respect to whether that would be considered retroactive for cases that were already pending, and we were trying to determine exactly how that statute would apply to cases that were already pending.

The Court has ruled that it was not retroactive. Therefore,

that means that this case has elements in it that are subject to jury trial and elements in it that are not subject to jury trial. That presents a very difficult situation for the attorneys since some of the evidence you would be entitled to hear and some of it you would not be entitled to hear.

Under the circumstances, the parties have agreed to go forward on the matter entirely without a jury in order to avoid that problem, and it was -- we were unable to ascertain that until this morning. So I apologize for the delay, and that's why we are excusing you at this time. Thank you very much.

(Jurors taken out.)

THE COURT: Do you want to bring your client in? All right. This is case 88CV0786, Patrice Dickinson versus Ohio Bell Communications Incorporated.

We have several matters to put on the record at this time. The Court had previously indicated that based upon its understanding of a recent change in the law the Title VII issues would be subject to jury trial. Based upon further research, and the fact that Congress did not specify in the amendments to Title VII that were enacted just last year whether it would be retroactive or not, and based upon the fact that this case was originally filed in 1988, the Court indicated to counsel this morning that the Court would rule that the right to a jury trial added last year would not be retroactive.

Therefore, there would be certain claims in this case that would be subject to jury trial and certain claims that would not be subject to jury trial. That obviously presented difficulties with respect to the trial of the case, difficulties for counsel since the jury would be entitled to hear some evidence and not entitled to hear other evidence.

Based upon these difficulties, the counsel for plaintiff indicated that they would waive the jury trial with respect to all issues and go forward on the basis of a court trial. The Court also would indicate that the Court will waive the normal jury fee for cases where a jury is waived only in the last two days because it was not the fault of the plaintiff's counsel that that waiver came

at a late time, so I will order that those fees be waived.

And I believe that, Miss Chadwell, you wanted to go on the record at this time.

MS. CHADWELL: Yes, your Honor. Your Honor, I would just like to object at this time to the issue of the jury not being allowed to hear the Title VII claims. I was not prepared for this this morning. I do have some case law on the matter. I don't think that the Sixth Circuit has definitively answered the question as to whether or not the amendment to Title VII is retroactive.

I do know of some cases, and I will provide those to the Court--

THE COURT: All right, fine.

MS. CHADWELL: -- albeit district courts in Montana, who have decided that the amendment is retroactive. So just note my objection.

THE COURT: Sure. I will allow you to supplement your motion--

MS. CHADWELL: Thank you.

THE COURT: -- whenever you obtain the information. Thank you.

Anything further from either counsel preliminarily at this time? All right, fine. We will proceed to opening statements.

Miss Chadwell.

****

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____

Susan K. Trischan, Official Court Reporter

539 U.S. Courthouse
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APPENDIX D

FILED
92 MAR 24 PM 4:08

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICE DICKINSON,
Plaintiff
-vs-
OHIO BELL COMMUNICATIONS, INC., et al.
Defendants

JUDGE PAUL R. MATIA

CASE NO. 1: 88CV0786

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff, Patrice Dickinson, is a black female.

2. After graduating from Cornell University in 1975 and after having received masters training there, Ms. Dickinson returned to Cleveland and became employed by the Ohio Bell Telephone Company in 1979.

3. Ms. Dickinson's first position was in the marketing department as a Marketing Administrator for small telephone systems in the small banks and brokers market.

4. Ms. Dickinson received promotions within the marketing department and became a Marketing Administrator involved in larger and more complex phone systems.

5. The Marketing Administrator, later known as a Systems Design Consultant ("SDC"), assisted the Account Executives ("AE"), the persons responsible for selling the phone systems, in the design of phone systems for potential customers and then in the implementation of the phone systems once the system was sold.

6. The SDC position was considered a support-type position within the company.

7. In 1984, after divestiture, Ohio Bell Telephone Company formed Ohio Bell Communication, Inc. ("OBCOM"), as the sales and marketing arm for Ohio Bell's products.

8. Ms. Dickinson was hired on as an SDC at OBCOM. Her duties at OBCOM were greater because OBCOM did not have as much support staff as Ohio Bell Telephone Company did.

9. In 1984, Ms. Dickinson was a highly regarded, successful SDC at defendant OBCOM.

10. As an SDC, Ms. Dickinson was responsible for supporting one or more OBCOM AEs who were expected to sell telecommunications systems, such as Centrex services, and large blocks of telecommunications equipment known as customer premises equipment.

11. During the years that she was an SDC, Ms. Dickinson's performance was always rated above-average and she generally received a bonus each year as a reward for her superior performance.

12. Ms. Dickinson's principal SDC work was in the financial market, including banks and stockbrokers, throughout the State of Ohio. In 1984 the AE for that market was Gary Miscensic.

13. Miscensic was a successful AE responsible for at least $850,000 in 1984 sales in the financial market. His 1985 sales projections were equally promising. However, in December of 1984, Miscensic was transferred to another position at OBCOM's parent, Ohio Bell Telephone Company.

14. When Miscensic moved to Ohio Bell, his Regional Sales Manager Gary Miller, a black male, asked plaintiff if she would like to try to take over as the AE for the financial market. Miller believed that, because she worked in the financial market as an SDC, Ms. Dickinson had the knowledge of both the customers and the products to be sold. She likewise believed that she could become a successful AE in that market.

15. Ms. Dickinson accepted the position because the AEs had a significant career path potential in that an AE could advance to many other positions within the company. Further, AEs had the opportunity to make significant sums of money over and above their set salary.

16. On or about January 1, 1985, Ms. Dickinson succeeded Miscensic as the AE for the financial market. As with all OBCOM AEs, Ms. Dickinson's position was an at-will employment. However, because she had to wind up a number of SDC matters for which she had earlier responsibility, Ms. Dickinson actually performed a dual function of SDC and AE for the financial market during the first three months of 1985. During that period, her base salary was adjusted upward by 10% (for an 80/20% split between base and commissions).

17. On or about April 1, 1985, Ms. Dickinson completed her SDC activities, and became a full-time AE in the financial market. Accordingly, her base salary was adjusted downward by 10% to match all other Cleveland-based AEs (70/30% split).

18. Gary Miller did not give Ms. Dickinson any revenue goals for minimum sales requirements for the AE job.

19. Mr. Miller never complained of Ms. Dickinson's performance as an AE.

20. On or about June 1, 1985, Miller left OBCOM and Ken Krstolic, a white male, became Ms. Dickinson's Regional Sales Manager.

21. On or about June 10, 1985, Krstolic met with plaintiff to review her current sales and sales forecasts. Ms. Dickinson showed Krstolic a promising forecast. As he did with all his AEs, Krstolic maintained "coaching notes" on that and all ensuing monthly meetings with Dickinson. At this first meeting, Krstolic advised Dickinson that his management philosophy was to be available whenever an AE needed him, but otherwise to "stay out of the way." He encouraged her to feel free to ask for assistance at any time. Krstolic testified that Dickinson was "optimistic" and confident of success.

22. At the July 1985 sales meeting with Krstolic, Dickinson submitted another promising sales forecast. Krstolic noted in his coaching notes that "some" of Dickinson's forecasts were "getting old," but that, again, plaintiff was optimistic.

23. Dickinson recalls one meeting with Krstolic introducing himself as her manager. Sometime between July 23, 1985, and August 28, 1985, Krstolic met Dickinson in an elevator at the offices of OBCOM. In the elevator, Krstolic asked Dickinson whether she

wanted to return to the SDC position.

24. Dickinson told Krstolic she had recently become an AE and wanted to continue in the position.

25. At their August 23, 1985, sales meeting, this time joined by Krstolic's boss, OBCOM Vice President of Sales, Jackie Woods, Krstolic again found that Dickinson's sales forecasts, while still optimistic, were growing old. Meanwhile, during the second and third quarters of 1985, Dickinson's actual sales were what Jackie Woods called "item sales", i.e., individual or small unit sales, rather than whole telecommunications systems or even large blocks of CPE sales of the kind and volume expected of the AEs. Accordingly, Krstolic and Woods advised plaintiff Dickinson that she would be required to attain $200,000 in sales by the end of 1985. This figure was only a third of the 1985 objective for Cleveland AEs. Further, Krstolic and Woods told Dickinson that, because of her lack of sales revenue, plaintiff would be required to undergo a quarterly review of her AE status in 1986. In that regard, Krstolic and Woods told Dickinson that, if a change became necessary, she would be given an opportunity to resume her SDC position. Dickinson again expressed confidence in her ability to "make it" as an AE.

26. The sales forecasts given by Dickinson were inaccurate. She closed none of the accounts listed in her sales forecasts. Instead she continued making item sales typical of SDCs. Her total 1985 sales were only $183,345.

27. On October 9, 1985, Dickinson, along with the other OBCOM sales personnel, received a memo from OBCOM President Duncan Campbell regarding sales results required of the AEs.

28. As a result of her concern of not attaining the required revenue (over $600,000 in order to remain constant in salary treatment), Dickinson prepared a memorandum to Krstolic setting forth her concerns.

29. On December 19, 1985, Krstolic and Woods certified plaintiff Dickinson as an AE despite plaintiff's poor sales results. A requirement for continuing in the AE position, certification meant that plaintiff received an 8% pay hike. Krstolic testified that he and Woods agreed to certify Dickinson as an AE in an effort to encourage her to be successful as an AE. However, because Dickinson's sales results

were unsatisfactory, Krstolic and Woods conditioned plaintiff's AE certification on a quarterly basis for `1986. They gave Dickinson a $200,000 objective for the first quarter of 1986. This was one-fourth of OBCOM's total 1986 objective for each Cleveland-based AE. If Dickinson did not meet that objective, she would have to relinquish her AE position. Krstolic and Woods advised Dickinson that if a change became necessary, she would be allowed to resume her SDC duties.

30. Dickinson's December 19, 1985, sales forecast for all of 1986, including new accounts that either she or Krstolic added to plaintiff's market segment, exceeded $1,000,000. However, Dickinson's first quarter sales were only $53,153.

31. In early March 1986, as it became increasingly clear that Dickinson would likely not make her sales objective, Krstolic sent Dickinson a memorandum in which he reviewed plaintiff's past sales performance, her unfulfilled sales forecasts, their prior meetings, and related matters. Krstolic also advised Dickinson that if she did not meet her first quarterly objective, or at least come "reasonably close. . . and/or be able to provide evidence of high probability, short term meaningful revenue potential" by March 31, 1986, he would have no alternative but to make a change in Dickinson's AE assignment.

32. On or about March 14, 1986, Dickinson applied for a job on the "staff side" at OBCOM because she did not want to go back to the SDC job. She testified that Krstolic and/or Woods approved plaintiff's transfer request. Unfortunately, unknown to all three, the staff position was not available since someone had already been offered the position.

33. Unable to meet the condition of her AE certification, Dickinson met with Krstolic and Woods on March 27, 1986, to discuss the situation. Krstolic and Woods told Dickinson they were going to make a change. They again offered Dickinson the opportunity to resume her SDC responsibilities. Dickinson admitted that the SDC job would have meant an increase in her salary in light of her sales performance as an AE. Dickinson again refused the SDC position, and Krstolic and Wood terminated plaintiff Dickinson.

34. After Dickinson was terminated, Krstolic divided her market share among three white male AEs. Total sales in that market for

1986 and 1987 were $446,328. However, the market was covered by the three AE on an "as time allows" basis in addition to their own markets.

35. None of the other AEs had a requirement placed on them to sell $200,000 by the end of the first quarter of 1986. As of March 31, 1986, only four of ten AEs achieved over $200,000 in revenue sales. None of the other AEs were terminated at that time. However, the other AEs all had prior sales histories with OBCOM, had reasonable prospects of achieving their 1986 goals, and all were subject to the October 9, 1985, memorandum from the OBCOM President, Duncan Campbell. By the end of 1986, additional AEs who were not producing at the expected level were terminated, transferred, or left of their own accord.

36. Dickinson testified that OBCOM Vice President of Personnel Ernestine Turner Williams, a black female, told Dickinson that OBCOM President Duncan Campbell had announced at a staff meeting that black females cannot "make it" as AE. Mrs. Williams denied that she ever told Dickinson that or that Campbell ever said it. Mrs. Williams had been a successful black female AE, as was Theo Scott, a contemporary of Dickinson in OBCOM's Toledo, Ohio, office. The Court finds that Mrs. Williams's testimony on this matter is credible. As OBCOM's Vice President of Personnel and, later, its EEO Coordinator, Mrs. Williams was responsible for, among other duties, preventing race and sex discrimination.

CONCLUSIONS OF LAW

1. As an at-will employee, Ms. Dickinson had no right to remain in her AE assignment. OBCOM was free to terminate Dickinson at any time with or without good cause. OBCOM's only duty was not to engage in impermissible race-or sex-based discrimination.

2. In order to make out a prima facie case of discrimination under Title VII, Dickinson must show: 1) that she was qualified to continue as an OBCOM AE and; 2) that other AEs not in the protected class (black females) were not terminated. Plaintiff Dickinson failed to establish either prong of this test.

3. Assuming that Dickinson met the prima facie requirements, which this Court concludes she did not do, the burden then

shifted to OBCOM to articulate a legitimate, nondiscriminatory reason for its decision to remove Dickinson from the AE position. OBCOM has met that burden. The Court finds that the decision was based entirely on Dickinson's poor sales results and lack of prospects. OBCOM offered an adequate, reasonable, and persuasive explanation for its business decision to continue other AEs whose sales were below Dickinson's at the time of her termination.

4. Again assuming that Dickinson made out a prima facie case, which the Court concludes she did not do, and in view of OBCOM's articulating a legitimate, nondiscriminatory business reason for its decision, the burden would shift back to Dickinson to prove that OBCOM's proffered reasons are pretextual, and that OBCOM was really motivated by racial or sexual animus. The court concludes that Dickinson did not prove this pretext. The Court further concludes that OBCOM's motivation was business-oriented; and that neither racial nor sexual factors were considered. The Court concludes that, as a matter of law, OBCOM did not discriminate against plaintiff Dickinson in violation of Title VII of the Civil Rights Act of 1964.

IT IS SO ORDERED.

_____

UNITED STATES DISTRICT JUDGE

BEST AVAIL

AO 450 (Rev. 5/85) Judgment in a C... ...

United States District Court

NORTHERN DISTRICT OF OHIO

PATRICE DICKINSON

V

OHIO BELL COMMUNICATIONS, INC., et al.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 1:88CV0786

Pursuant to the Court's Findings of Fact and Conclusions of Law , Judgment is entered for defendant.

March 24, 1992

Date

Clerk

Beverly Ingram

(By) Deputy Clerk

ABLE COPY

93-673
No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

PATRICE DICKINSON,
Petitioner,

vs.

OHIO BELL COMMUNICATIONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether, irrespective of the retroactivity of the Civil Rights Act of 1991, a Title VII claimant has a right to a jury trial where the district court in which the action is filed concludes as a matter of law that the claimant cannot establish a *prima facie* case of discrimination?

No. _____

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October Term, 1993

PATRICE DICKINSON,
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BRIEF FOR RESPONDENT

REASONS FOR DENYING PETITION FOR A WRIT OF CERTIORARI

The District Court concluded, and the Court of Appeals affirmed, that as a matter of law petitioner failed to establish even a *prima facie* case of discrimination. *See* 7/7/93 *Per Curiam* Opinion of the Sixth Circuit Court of Appeals (copy appended as Appendix A to Petition for Certiorari) at A-3. Petitioner is not appealing that conclusion to this Court.

Whatever its retroactive effect, the Civil Rights Act of 1991 does not suspend or otherwise limit a district court's power to grant a directed verdict. Even if this Court remands this action for a jury trial, the District Court must still determine whether petitioner has established a *prima facie* case of discrimination in order to go to the jury. The District Court has already held that petitioner cannot do so.

The evidence is insufficient to allow this case to go to a jury. Consequently, this Court's decision on the retroactivity of the jury trial provision of the Civil Rights Act of 1991 will not change the disposition of this case.

CONCLUSION

For the foregoing reasons, and for any additional reasons which may hereafter appear, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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